

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

**ORIGINAL
RECEIVED
AUG 23 1995**

In re Application of)
)
METROPOLITAN WASHINGTON AIRPORTS)
AUTHORITY)
)
Request for Declaratory Ruling Regarding)
Demarcation Point at Washington Dulles)
International Airport)

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

File No.

CC 95-149

DOCKET FILE COPY ORIGINAL

**MOTION OF GTE SOUTH INCORPORATED FOR
PUBLIC NOTICE AND COMMENT AND COMMENTS ON MOTION FOR
EXPEDITED CONSIDERATION**

GTE South Incorporated ("GTE"), by its attorneys and pursuant to Sections 1.41 and 1.45(a) of the Commission's Rules of Practice and Procedure (47 C.F.R. §§ 1.41, 1.45(a) (1994)), hereby respectfully petitions the Commission to issue a public notice calling for public comment on the Request for Declaratory Ruling Regarding the Demarcation Point at Washington Dulles International Airport (the "WMAA Request") filed by the Washington Metropolitan Airports Authority ("WMAA") on August 14, 1995, and submits comments on WMAA's concurrently-filed Motion for Expedited Consideration (the "WMAA Motion").

I. INTRODUCTION

GTE is a public service corporation under VA. CODE ANN. § 56-1 (Michie 1995 Repl. Vol.) providing local exchange telephone service at Washington Dulles International Airport ("Dulles"), including to WMAA, the airport itself, industrial and commercial buildings on airport property, and the surrounding community not on airport property, as well as to other exchanges

in the Commonwealth of Virginia and other states. GTE holds a Certificate of Public Convenience and Necessity under VA. CODE ANN. § 56-265 (Michie 1995 Repl. Vol.), authorizing it to furnish telecommunications service in its Virginia exchanges, including the Dulles exchange. GTE's Virginia headquarters is in Mechanicsville, Virginia.

WMAA is a body corporate and politic created by an interstate compact between the Commonwealth of Virginia and the District of Columbia to operate and maintain Washington National Airport and Dulles International Airport, consisting of the airport itself (passenger and freight terminals and its associated service buildings), as well as significant commercial and industrial facilities constructed on airport land. See 49 U.S.C. App. §§ 2451-2461 (1988 & Supp. V 1993). Its headquarters is in Alexandria, Virginia.

WMAA has requested expedited consideration of its underlying request without any public notice. Granting this request would be imprudent because the Commission must address important public policy issues of first impression before it takes final action on the WMAA Request. The Commission should have the benefit of a fully-developed record in resolving those issues, and therefore should notice the WMAA Request for public comment.

Moreover, contrary to WMAA's contention, see WMAA Motion at 2-3, a number of additional parties have a readily-apparent economic interest in the Commission's resolution of the WMAA Request. GTE's current customers have an obvious economic interest in this matter because the Commission's ruling will have a profound impact on their practical ability to exercise their right under Virginia law to take service directly from GTE, the local exchange carrier ("LEC") of last resort, or (after January 1, 1996) from a competitive access provider ("CAP"),

rather than from MWAA. Potential CAPs also have an economic interest in this matter because the Commission's resolution will have a determinative impact on their ability to offer competitive local exchange service to the lucrative industrial-commercial facilities located adjacent to the airport proper on land controlled by MWAA. Finally, the Virginia State Corporation Commission ("VSCC") has primary jurisdiction to determine whether MWAA's proposed telecommunications facility is properly classified as an shared tenant service ("STS") provider or CAP under Virginia law. Moreover, the VSCC is presently reconsidering its rules regarding STS in light of its obligation under a recently-enacted Virginia statute to permit competitive access carriers within the Commonwealth by January 1, 1996. In light of this important regulatory role and basic principles of federal-state comity, the Commission should solicit and consider the Virginia Commission's comments before resolving the underlying dispute.

II. IMPORTANT PUBLIC POLICY QUESTIONS REQUIRE THAT THE COMMISSION SOLICIT PUBLIC COMMENT ON THE WMAA MOTION

Since Dulles began operation over 30 years ago, GTE (or its predecessor, Contel) has held a Certificate of Public Convenience and Necessity from the VSCC to serve the airport and surrounding community as the LEC. As the certificated LEC, GTE has constructed a local exchange switch and network currently serving over 5,000 customers on and adjacent to the 10,000 plus acre Dulles complex. Pursuing its plan to construct telecommunications facilities at Dulles, MWAA has unilaterally denied GTE access to maintain its local exchange network, except as WMAA may in its sole discretion permit and only on an "unregulated basis." See Letter from Ian D. Volner, Esq., Attorney for WMAA to A. Randall Vogelzang, Esq., GTE Telephone Operations 1 (June 5, 1995) (the "Volner Letter") (provided as Attachment 2-A to the WMAA

Request). WMAA then purports to dictate the terms under which it might "authorize" GTE to make repairs by decreeing that any repairs or modifications to GTE's local exchange network "shall be at the expense of the party requesting or necessitating such repair or replacement." Id.

WMAA does not indicate its authority in law to abrogate contracts between GTE and its customers (to which it is not a party) or to negate Virginia statutes and regulations which require GTE to maintain its local exchange network. Under Virginia law, GTE has a duty to serve any customer within its certificated territory desiring such service and is subject to penalties if it fails to render such service. See, e.g., VA. CODE ANN. § 56-469 (Michie 1995 Repl. Vol.) (establishing fifty dollar forfeiture for each call not dispatched). In order to fulfill this duty, GTE must be able to use and control its own equipment. Without seeking a Certificate of Public Convenience and Necessity from the VSCC, WMAA effectively seeks to oust GTE as the LEC for the Dulles exchange and substitute itself as a wholly-unregulated bottleneck monopolist with the practical ability to impose its service on 5,000 plus captive customers in the Dulles exchange.

WMAA seeks the Commission's acquiescence and participation in its plan by seeking a declaratory ruling establishing a single demarcation point for the entire 10,000-plus acre Dulles complex. WMAA contends that establishment of a single demarcation point for the entire Dulles local exchange area would effectively convert GTE's entire outside local exchange network into "inside wiring" controlled by WMAA. Despite WMAA's statement that "GTE will, as a matter of law, continue to own cabling both on its side and the Airport Side" of the point which WMAA petitions the Commission to designate as a single demarcation point,¹⁷ WMAA's proposed treatment

¹⁷ See Volner Letter at 1.

of the facilities which GTE will continue to "own" is effectively the same treatment afforded inside wiring. Indeed, it is unclear whether the incidents of ownership retained by GTE will have any value.

The WMAA petition raises several public policy issues which demand the opportunity for public participation. First, it is questionable whether the proposed WMAA services are properly characterized as STS under regulations issued by the Virginia Commission. See Investigation of Private Resale or Shared Use of Local Exchange Services, Final Order, 3:1 Va. Regs. REG. 328 (Nov. 10, 1986). Moreover, the Virginia Commission is now reevaluating its STS rules in conjunction with the adoption of rules to regulate competitive access providers. See Investigating Local Exchange Telephone Competition, Including Adopting Rules Pursuant to Va. Code § 265.4:4.C.3, 11:21 Va. Regs. Reg. 3547, 3551 (July 10, 1995). The FCC has specifically elected not to preempt state law on this issue. See Policies Governing the Provision of Shared Telecommunications Service, 3 F.C.C. Rcd. 6931 (1988). Thus, it is for the Virginia Commission, not the FCC, to determine whether WMAA may offer STS on the scale it presently envisions. The FCC should not precipitously cut-off the lawful discretion of the Virginia Commission by ruling on the WMAA Request without even soliciting its comments.

Second, the WMAA Request implicates far more than the simple issue of where to locate a demarcation point, but requires resolution of a significant property issue regarding ownership of a local exchange. To GTE's knowledge, no LEC customer has ever attempted to convert an entire local exchange network into inside wiring. Resolution of this novel issue will have an obvious impact on all LECs and their customers. For instance, many large university campuses are

served by a dedicated local exchange. If the Commission permits WMAA effectively to seize GTE's Dulles network, universities could similarly seize the dedicated local networks serving their campuses. One of the main purposes of public comment is to assist the Commission to appreciate the nature and the extent of the impact of its decisions. The Commission should solicit comment to that effect. In addition, the Commission should develop a record to determine whether the Commission's authority in the present matter is limited by the D.C. Circuit's decision in Bell Atlantic Telephone Companies v. FCC, 24 F.2d 1441, 1447 (D.C. Cir. 1994), which restricted the Commission's power to impose solutions diminishing traditional property rights. The physical collocation struck down by the D.C. Circuit in Bell Atlantic is a far less severe infringement of property rights than that which would be caused by Commission approval of effectively seizing an entire local exchange network without any compensation.

III. PARTIES OTHER THAN GTE AND WMAA HAVE A VITAL FINANCIAL INTEREST IN THE COMMISSION'S ACTION ON THE WMAA REQUEST

WMAA's assertion that no other parties have an interest in the instant dispute is plainly incorrect. Any entity which can demonstrate that the Commission's resolution of a matter will have more than a de minimis potential economic impact has standing to petition for judicial review of the Commission's decision. 47 U.S.C. § 402(b)(2) (1988); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477 (1940); Camden Radio, Inc. v. FCC, 220 F.2d 191, 195 (D.C. Cir. 1955). At a minimum, GTE's current customers have a vital interest in the outcome of a proceeding which will determine whether their economic lifeblood, local telephone service, will be provided by a public service corporation regulated under the law of the Commonwealth or by an unregulated entity seeking to establish and control a telecommunications bottleneck. This is particularly true

because, by January, 1996, GTE's Dulles customers will be able to contract to take local exchange service from regulated CAPs.^{2/} In addition, potential CAPs, most notably Bell Atlantic, the certificated territory of which abuts the eastern edge of Dulles Airport, have an obvious financial interest.

IV. THE WMAA REQUEST DOES NOT NEED TO BE RESOLVED FOR WMAA TO CONSTRUCT A SHARED TENANT SERVICE NETWORK AT DULLES

WMAA contends that the Commission must determine that GTE is entitled to but a single demarcation point, and the location of that demarcation point, before WMAA can begin construction of its telecommunications system. This argument is without merit. First, the existence of GTE's local exchange network does not prevent WMAA from undertaking any construction that it pleases. Further, the construction which WMAA suggests would be subject to delay ("final decisions with respect to the location of telecommunications infrastructure--telephone closets, frames, etc.--in the expanded main building") is clearly on the WMAA side of any demarcation point the Commission might approve, and therefore subject to the sole discretion of WMAA as the owner of that inside wiring. See WMAA Motion at 2.

Even disregarding the specific inside wiring that WMAA erroneously asserts is subject to delay during pendency of this proceeding, WMAA's argument is also incorrect with respect to the outside telecommunications network MWAA intends to construct. As discussed above, the legal status of that network (as a CAP or STS) is a matter for the VSCC to determine. No design or construction considerations depend upon that determination. The most unfavorable VSCC

^{2/} See VA. CODE ANN. § 56-265.4:4.C (Michie 1995 Repl. Vol.).

determination from WMAA's standpoint would be a determination that the WMAA network is a CAP. If the VSCC determines that the WMAA network is a CAP, the WMAA network and the GTE local exchange network will exist side-by-side, each competing with facilities reaching customers throughout the Dulles industrial and commercial complex. The only impact that the Commission's resolution will have on the WMAA system is economic. If the Commission agrees to establish a single demarcation point for the entire 10,000-plus Dulles complex, MWAA will benefit from the economic certainty that the 5,000 customers served by GTE's current local exchange network will effectively become captive customers of the MWAA network, eliminating all risk associated with constructing its network. It is the economic certainty of eliminating GTE as an effective competitor that MWAA wants before it commences construction. GTE's objection to MWAA's current plan only extends to MWAA's insistence that GTE abandon its existing local exchange network.

MWAA's request that the Commission establish a single demarcation point now is particularly puzzling, because by MWAA's own admission it has not yet constructed its facilities and is therefore currently unable to provide communications services. See MWAA Motion at 2. MWAA actions place GTE's current customers in a precarious position, at least until the MWAA network is constructed. MWAA has no network in place to serve them, but is unilaterally preventing GTE from maintaining the only existing local exchange network., raising a significant reliability question, at least before the MWAA network is constructed. In short, the Commission

has time to notice the MWAA request for public comment, analyze those comments, and issue a decision before MWAA is in a position actually to offer telecommunications service.^{3/}

In addition, the Commission should note that MWAA and GTE have been negotiating a resolution of this dispute for over two years. See id. at 1. MWAA should have submitted its Request for Declaratory Ruling in time for the Commission to act on it on an other than "emergency" basis. MWAA should not now be heard to insist that the Commission make an important policy decision in a vacuum because MWAA delayed its filing.

V. CONCLUSION

For the foregoing reasons, the Commission should notice MWAA's August 14, 1995 Request for Declaratory Ruling Regarding the Demarcation Point at Washington Dulles International Airport for public comment, because of the important public policy issues involved, and because GTE's current customers, other local exchange carriers, and the Virginia State Corporation

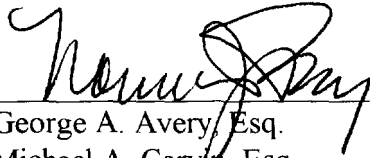
^{3/} MWAA represents that its telecommunications facilities will be ready for service sometime in January, 1996. See MWAA Motion at 2. If the Commission places the MWAA Request on public notice by September 1, 1995, the comment and reply comment periods will expire October 15, 1995. This would leave two and a half months for the Commission to take action before MWAA is in a position to offer telecommunications service.

Commission have important interests at stake which will be affected by the Commission's ruling in this matter.

Respectfully submitted,

GTE SOUTH INCORPORATED

By:


George A. Avery, Esq.
Michael A. Carvin, Esq.
Norman J. Fry, Esq.

Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037-1128
(202) 663-8856

David J. Gudino, Esq.
GTE Service Corporation
1850 M Street, N.W. Suite 1200
Washington, D.C. 20036-5801
(202) 463-5212

Its Attorneys

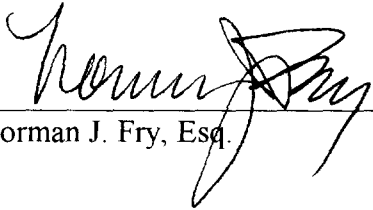
August 23, 1995

CERTIFICATE OF SERVICE

I, Norman J. Fry, Esq., do hereby certify that a true and correct copy of the foregoing document was sent by first-class mail, postage prepaid, or hand-delivered, on this 23d day of August, 1995, to the following persons:

- * Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554
- * Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554
- * Commissioner Andrew C. Barrett
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554
- * Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554
- * Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554
- * Julius Genachowski, Esq.
Special Assistant
Office of the Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554
- * William E. Kennard, Esq.
General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

- * Kathleen M.H. Wallman, Esq.
Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, D.C. 20554
 - * Kathleen B. Levitz, Esq.
Deputy Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, D.C. 20554
 - * John S. Morabito, Esq.
Chief, Domestic Facilities Division
Federal Communications Commission
2025 M Street, N.W., Room 6206
Washington, D.C. 20554
 - * Ian D. Volner, Esq.
Venable, Baetjer, Howard & Civiletti
1201 New York Avenue, N.W., Suite 1000
Washington, D.C. 20005-3917
Counsel for Metropolitan Washington
Airports Authority
- Naomi C. Klaus, Esq.
Assistant Legal Counsel
Washington Metropolitan Airports
Authority
44 Canal Center Plaza
Alexandria, VA 22314-1562



Norman J. Fry, Esq.

* Hand Delivered